IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RAINES IMPORTS, INC., d/b/a LESTER RAINES HONDA, a West Virginia Corporation,

Petitioner/Appellant,

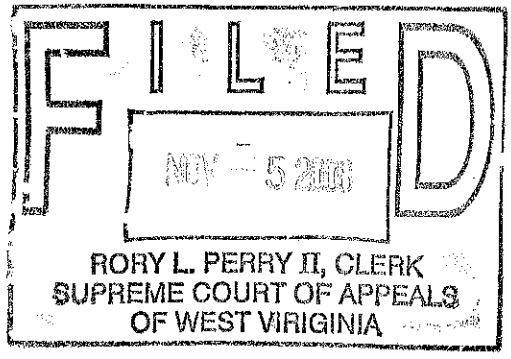
APPEAL NO. 33803

v.

CIVIL ACTION NO. 06-C-1422
The Honorable Charles E. King

AMERICAN HONDA MOTOR COMPANY, INC., a California Corporation,

Respondent/Appellee.



REPLY BRIEF ON BEHALF OF APPELLANT, RAINES IMPORTS, INC., d/b/a LESTER RAINES HONDA

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November 4, 2008

Petitioner, Raines Imports, Inc., d/b/a Lester Raines Honda ("Lester Raines"), respectfully submits this Reply in response to the Brief of Appellee American Honda Motor Co., Inc. ("American Honda"). As discussed more fully in Petitioner's Brief, the circuit court ruled prematurely on the pleadings and disregarded Petitioner's valid 56(f) affidavit. In essence, the court issued a ruling based solely on the bald, self-serving allegations of defense counsel — no discovery was permitted, and thus, not a scintilla of actual evidence was before the court at the time of its ruling. Granting summary judgment under such circumstances is a miscarriage of justice and constitutes reversible error.

The Respondent's principal argument — namely, that the Circuit Court's grant of summary judgment was appropriate in this case — cannot be supported where absolutely no discovery was received and the circuit court failed to rule on the pending motion to compel discovery before granting summary judgment. *See Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 61, 459 S.E.2d 329, 358 (1995). It is black letter law that summary judgment is appropriate only after the non-moving party has enjoyed "adequate time for discovery." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5 (1986). As this Court has unequivocally held, "a decision for summary judgment before discovery has been completed *must* be viewed as precipitous." *Bd. of Educ. of the County of Ohio v. Van Buren & Firestone, Arch., Inc.*, 165 W. Va. 140, 144, 267 S.E.2d 440, 443 (1980) (emphasis added).

This Court has likewise ruled that it is improper to grant summary judgment while discovery motions are pending. *See Truman v. Farmers & Merchants Bank*, 180 W. Va. 133, 136, 375 S.E.2d 765, 768 (1988) (holding that where "facts relevant to a motion for summary judgment need to be developed by further discovery, the trial court should not grant the

motion").[1] In reversing the grant of summary judgment, this Court recognized in *Truman* that "by foreclosing any discovery on the part of [the plaintiff] by failing to rule on her motion to compel discovery, she was deprived of developing her case so as to resist [the defendant's] summary judgment motion" *Truman*, 180 W. Va. at 135, 375 S.E.2d at 767.

Additionally, where a party requires additional information to more fully respond to a motion for summary judgment, the court may, pursuant to Rule 56(f) of the West Virginia Rules of Civil Procedure, "refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." W. Va. R. Civ. P. 56(f); *see also, Harbaugh v. Coffinbarger*, 209 W. Va. 57, 543 S.E.2d 338 (2000); *Payne's Hardware & Building Supply, Inc. v. Apple Valley Trading Co.*, 200 W. Va. 685, 490 S.E.2d 772 (1997).

In applying the foregoing principles to the instant case, it is clear that the circuit court's grant of summary judgment was precipitous and improper. The record clearly indicates that, notwithstanding Lester Raines' timely discovery requests, American Honda steadfastly refused to permit any discovery and in fact obstructed Lester Raines' efforts to obtain necessary and relevant discovery. On November 2, 2006, two days after the time for discovery opened in this case, Lester Raines sent its First Set of Interrogatories and Requests for Production to counsel for American Honda.[2] On November 17, 2006, rather than answer any of Lester Raines' routine and

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[1] As discussed in Petitioner's Brief, *Truman* is strikingly similar to the instant case. In *Truman*, the plaintiff sought discovery from the defendant bank. However, rather than responding to the discovery requests served upon it, the defendant filed a motion for protective order and later a motion for summary judgment. Plaintiff, still seeking discovery in the case, filed a motion to compel. The Circuit Court improperly granted summary judgment for the defendant without considering the pending discovery motions, including plaintiff's motion to compel discovery. *Truman*, 180 W. Va. at 135, 375 S.E.2d at 767.

[2] Lester Raines' discovery requests were tailored to the factors set out in West Virginia Code § 17A-6A-12, which American Honda has the burden of establishing in this case in order to show good cause for opening a new dealership in Lester Raines' market area. The discovery requests were designed

narrowly tailored discovery requests, American Honda filed its first Motion for Protective Order. Following remand, Lester Raines immediately re-served its discovery requests upon American Honda. Again, American Honda filed a Motion for Protective Order rather than respond to Lester Raines' routine requests. Lester Raines attempted to get deposition dates for Christian Miller.[3] When no response was received to Lester Raines' requests for dates for Mr. Miller's deposition, it was set by Plaintiff's counsel for February 15, 2007. Neither Mr. Miller nor counsel for American Honda appeared. In the absence of any discovery, American Honda then filed its Motion to Dismiss and Motion for Summary Judgment on March 5, 2007. In response, Lester Raines filed an opposition and its Motion to Compel Discovery on March 12, 2007.

Significantly, in this case, Mr. Lester Raines also executed a Rule 56(f) affidavit in connection with Lester Raines' Response to American Honda's supplemental motion for summary judgment indicating that he believed discoverable, material facts concerning American Honda's actions existed but had not been discovered due to American Honda's refusal to participate in discovery. (Mr. Lester Raines' Rule 56(f) affidavit is attached hereto as Exhibit A.) As set forth in his Rule 56(f) affidavit, Lester Raines was, at a minimum, entitled to discovery on the issue of whether American Honda engaged in any negotiations with Miller Auto Group, or any other dealers in the South Charleston area, prior to sending its May 24, 2006 letter.[4] Likewise, Lester Raines should have been entitled to discovery with respect to the

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to determine what information and documentation American Honda relied upon for its decision in May 2006 to open another Honda dealership in South Charleston. Lester Raines served a total of thirteen interrogatories and nine requests for production. The requests can hardly be said to be burdensome.

[3] Christian Miller was the author of the letters Lester Raines received from American Honda on May 24 and July 27, 2006 and was also the affiant for the affidavit attached to American Honda's original Motion to Dismiss filed in federal court.

[4] At the time the Circuit Court granted summary judgment in this case it found, as a matter of law, that American Honda's May 24, 2006 letter did not constitute notice as contemplated in § 17A-6A-

distance between the proposed new dealership location and Lester Raines' dealership and to determine if a new dealer agreement exists and has a probability of completion.[5] Even in the face of this affidavit, absolutely no discovery took place in this case before summary judgment was granted.

American Honda's unilateral decision to foreclose Lester Raines' discovery in this case, coupled with the court's failure to rule on the pending Motion to Compel Discovery, has deprived Lester Raines from developing its case to resist summary judgment. *Truman*, 180 W. Va. at 135, 375 S.E.2d at 767. For instance, some narrow discovery could have revealed that, as Lester Raines suspects, American Honda had reached, or nearly reached, an agreement with Miller Auto Group to open the new Honda dealership in South Charleston. Unfortunately, however, Mr. Miller passed away. It was at this time that Lester Raines believes American Honda changed its plan, had to seek a new dealer, and lost its initial South Charleston location for the dealership. If discovery reveals that these facts are accurate, this speaks directly to the issue of (i) whether American Honda intended its May 24, 2006 letter to constitute statutory notice (even though it denies these allegations now) and (ii) the ultimate issue of whether Lester Raines had standing to bring its declaratory judgment action.

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12. (*See* Exhibit A, Finding of Fact ¶ 3, Conclusion of Law ¶ 2.) This conclusion of law was made without the benefit of any discovery and was supported only by self-serving assertions by American Honda.

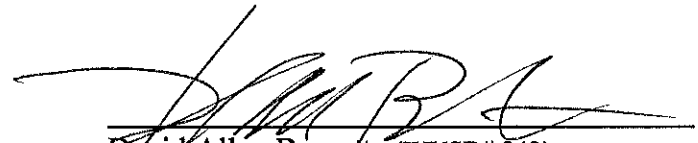
[5] At a minimum, The Circuit Court found, as a matter of fact, without discovery, that the new dealership proposed by American Honda was located more than 15 air-miles from Lester Raines. (*See* Exhibit A, Finding of Fact ¶ 9.) This finding was based on nothing more than a map and the self-serving representations by American Honda and its counsel. Lester Raines could not refute the allegation that the proposed new dealership was located outside the statutory radius because it was not given the opportunity to retain its own surveyor. Before summary judgment was considered by the Circuit Court, Lester Raines should have been entitled to discovery on, at least, these material issues.

Consonant with the spirit of Rule 56, summary judgment must not be granted on an incomplete factual record or where the nonmoving party has not been permitted to conduct any discovery on the material facts in dispute or take a single deposition. Simply put, American Honda should not be allowed to stonewall discovery and then seek summary judgment based on its own self-serving allegations. The circuit court erred in precipitously granting summary judgment to American Honda while discovery motions were pending. Fundamental fairness requires, at the very least, that the nonmoving party be given a chance to discover and present material evidence in the face of bald, unsupported allegations, and that simply did not happen here.

Respectfully submitted,

RAINES IMPORTS, INC. d/b/a
LESTER RAINES HONDA

By Counsel



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CERTIFICATE OF SERVICE

I, Vivian H. Basdekis, counsel for the Petitioner, do hereby certify that a true copy of the foregoing ***Reply Brief on Behalf of Appellant, Raines Imports, Inc. d/b/a Lester Raines Honda*** was served this 5th day of November, 2008, by first-class mail, postage prepaid, addressed as follows:

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